IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal against the judgment of the Provincial High Court dated 22/01/2014 in High Court Writ No.12/12

Case No. CA (PHC) 11/2014

H.C. Gampaha Case No. 12/2012 (Writ)

Nikapitiya Arachchilage Nanda Nikapitiya
of No.451/2A, Siyambalape North
Siyambalape.

Petitioner-Appellant

Vs.

01. B.D.Upul Shantha De Silva,
Registrar Commissioner for Western
Province Co-operative Societies,
Co-operative Development,
No.444, Duke Street,
Colombo 01.

02. Sarape Arachchige Asiri Sandaruwan
Weerasekera,
Walauwatte,
Keedagammulla,Gampaha.

03. R.Kulathilake,
Arbitrator,
Kekunagahawila, Hiswella.

04. Siyambalape North Credit and Thrift

401/2, Co-operative Society,

Siyambalape North,Siyambalape

05. U.Sunil Perera

Chairmen.

06. R.D.Atukorale

Secretary.

07. Chitra

Treasurer.

08. Shantha Kariyapperuma,

Committee Member

09. Dharmasiri

Committee Member

10. S.G.Perera,

Committee Member

11. Upul Perera

Committee Member

12. Anula Kariyapperuma

Committee Member

13. E.A.B.Hemachandra

North Credit and Thrift,

401/2, Co-operative Society,

Siyambalape North,Siyambalape.

Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Sudharshanie Cooray for the Petitioner-Appellant

J.M. Wijebandara with Lihini Fernando for the Respondents-Respondents

Written Submissions tendered on:

Petitioner-Appellant on 08.10.2018

Respondents-Respondents on 08.10.2018

Argued on: 29.08.2018

Decided on: 16.11.2018

Janak De Silva J.

This is an appeal against the judgment of the learned High Court Judge of the Western Province holden in Gampaha dated 22.01.2014.

At all times material to this application the Petitioner-Appellant (Appellant) was an employee of the 4th Respondent-Respondent (4th Respondent) and served as its Manager. The Appellant had obtained several loans from the 4th Respondent as a member and entered into two mortgage bonds for two lands as security for these loans.

The Appellant was sent on compulsory leave from 15.09.2009 pending conclusion of a preliminary investigation against her. As she was found guilty of several charges at the disciplinary inquiry conducted against her, by letter dated 29.07.2010 her services were terminated with effect from 14.09.2009.

Prior to the termination of the services of the Appellant, the 4th Respondent had by letter dated 13.01.2010 demanded a sum of Rs. 318,750/= from the Appellant as the overdue balance of a loan and thereafter several more demands were made requesting the Appellant to pay the outstanding amount on the other loans. This dispute between the Appellant and the 4th Respondent was referred to arbitration and the 3rd Respondent-Respondent (3rd Respondent) was appointed as the arbitrator.

After inquiry, the 3rd Respondent made order on 08.06.2010 directing the Appellant to pay the 4th Respondent a sum of Rs. 25,80,128/= calculated at an interest rate of 18% per annum on the loan amount and further directing the Appellant to pay the entire sum of Rs. 25,80,128/= on or before 02.09.2010.

The Appellant filed the above styled writ application in the High Court of Gampaha on or around 15.10.2012 seeking a writ of certiorari to quash the award of the 3rd Respondent and a writ of mandamus directing the Respondents-Respondents (Respondents) to accept the money owed by the Appellant to the 4th Respondent in reasonable instalments.

The learned High Court Judge dismissed the application and hence this appeal.

The grounds on which the learned High Court Judge dismissed the application of the Appellant were:

(1) The Appellant had failed to prefer an appeal against the arbitral award of the 3rd Respondent
(2) The application was filed after more than two years from the date of the arbitral award
(3) Section 58(5) of the Co-operative Societies Law No. 5 of 1972 (Law) read with section 22 of the Interpretation Ordinance limits the grounds on which the decision in appeal can be challenged

Failure to Prefer an Appeal

Section 58(3) of the Law states:

> *Any party* ***aggrieved by the award of the arbitrator or arbitrators may appeal therefrom to the Registrar*** *within such period and in such manner as may be prescribed by rules.*

In terms of Rule 49 (XII) (a) of the Rules made under section 61 of the Law every appeal to the Registrar from an award of an arbitrator or a panel of arbitrators shall be made within 30 days from the date of the award. Admittedly no such appeal was made by the Appellant.

The question is whether the Learned High Court Judge was correct in refusing the application of the Appellant for his failure to prefer an appeal to the Registrar as provided by Law.

The general principle is that an individual should normally use alternative remedies where available rather than judicial review [*R. (Davies) v. Financial Services Authority* (2004) 1 W.L.R. 185; *R. (G) Immigration Appeal Tribunal* (2005) 1 W.L.R. 1445]. Our Courts have held that where a party fails to invoke alternative remedies judicial review can be refused. [*Rodrigo v. Municipal Council Galle* (49 N.L.R. 89); *Gunasekera v. Weerakoon* (73 N.L.R. 262); *Obeysekera v. Albert & others* (1978-79) 2 Sri.L.R. 220); *Rev. Maussagolle Dharmarakkitha Thero and another v. Registrar of Lands and others* (2005) 3 Sri.L.R. 113]. The general principle is applicable even where the alternative remedy is an administrative procedure, such as in this case and Courts will require the party seeking judicial review first to exhaust such administrative procedure before invoking the discretionary power of judicial review [*R (Cowl) v. Plymouth City Council* (2002) 1 W.L.R. 803; *R. v. Barking and Dagenham LBC Ex. P. Lloyd* (2001) L.G.R. 421; *R. (Carnell) v. Regents Park College and Conference of Colleges Appeal Tribunal* (2008) E.L.R. 739].

However, as it is a general principle, Courts have recognized several qualifications in its application. There may be situations where the alternative remedy is not adequate and efficacious in which event judicial review is available [*E.S. Fernando v. United Workers Union and another* (1989) 2 Sri.L.R. 199]. It maybe that judicial review is capable of providing immediate means of resolving the dispute in which case it may be the more appropriate procedure. There may also be a need to obtain interim relief which may not be possible under the alternative

procedure. This is not an exhaustive list and there are certainly other instances where judicial review may be granted even though an alternative administrative procedure exists.

However, I am of the view that none of those considerations are present in this case. The Appellant submits that the failure to prefer an appeal is "of trivial nature" and that she was not aware of the arbitrariness, unreasonableness and malice of the arbitrator's award. I have no hesitation in rejecting these submissions. The failure to prefer an appeal is not of "trivial nature" for the reasons set out above. The Appellant was present when the award was made and signed the record which indicates that she was aware of the amount that had to be paid by her. An appeal should have been lodged within the time frame if the award was arbitrary, unreasonable and malicious as asserted. Even the application to the High Court was made after more than two years whereas the appeal should have been made within 30 days of the award. Accordingly, I see no reason to interfere with the finding of the learned High Court Judge on this issue.

In conclusion I wish to advert to the following statement of Lord Donaldson of Lymington M.R. in *R. v. Panel on Take-overs and Mergers Ex. P. Guinness Plc* [(1990) 1 Q.B. 146 at 177]:

> "I approach this appeal by reminding myself that the judicial review jurisdiction of the High Court, and of this court in appeal, is a supervisory or "long stop" jurisdiction...consistently with this "long stop" character, it is not the practice of the court to entertain an application for judicial review unless and until all avenues of appeal have been exhausted, at least in so far as the alleged cause of complaint could thereby be remedied. The rationale for this self-imposed fetter upon the exercise of the court's jurisdiction is twofold. First, the point usually arises in the context of statutory schemes and if Parliament directly or indirectly has provided for an appeals procedure, it is not for the court to usurp the functions of the appellate body. Second, the public interest normally dictates that if the judicial review jurisdiction is to be exercised, it should be exercised very speedily and, given the constraints imposed by limited judicial resources, this necessarily involves limiting the number of cases in which leave to apply should be given."

Both these rationales have practical utility in our legal system. Where Parliament has set up appellate procedures for addressing excesses of administrative power, that procedure must generally be resorted to prior to invoking the discretionary power of judicial review. This will assist in the Courts been able to exercise judicial review speedily when required. However, even in situations where appellate procedures are provided the Courts may still exercise powers of judicial review if relevant considerations exist.

Delay

The Appellant sought to assail the award of the arbitrator more than two years after it was made.

In *Sebastian Fernando v. Katana Multi-Purpose Co-operative Societies Ltd. and others* [(1990) 1 Sri.L.R. 342] the Supreme Court held that the plea of delay involves equitable considerations and that the conduct of both parties should be taken into account. It further held that delay by itself will not defeat an application and that it is only a discretionary bar to be applied having regard to the conduct of parties, the issues involved and the substantial prejudice which may result in varying the impugned order.

In this case between the making of the award and the filing of the application in the High Court, the 2nd Respondent had instituted proceedings in the District Court of Gampaha in action bearing No. 4369/Spl to execute the arbitral award in terms of the Co-operative Societies Charter of the Western Provincial Council and writ was issued. Accordingly, substantial prejudice will result if the arbitrators award is varied.

The learned counsel for the Appellant submitted that the Appellant was in remand from 07.07.2011 to 30.01.2012. However, the award was made on 08.06.2010 and she had more than one year before been remanded to make the application. Even after been granted bail she took another nine months before filing the application in the High Court on 15.10.2012.

It was further submitted that the Appellant was not sleeping over her rights but was in litigation with the 4th Respondent during 2012 August/September 2012 in D.C. Gampaha Case No. 4369/Spl. The issue is the delay in challenging the arbitral award and not the steps taken in defending its enforcement.

For the reasons set out above, I see no reason to interfere with the conclusion of the learned High Court judge on the delay in filing proceedings before the High Court.

Section 22 of the Interpretation Ordinance

Section 58(5) of the said Law states that;

> *A decision of the Registrar under subsection (2) or in appeal under subsection (3) shall be final and shall not be called in question in any civil court.*

Section 58(6) of the said Law states that;

> *The award of the arbitrator or arbitrators under subsection (2) shall,* ***if no appeal is preferred to the Registrar under subsection (3) or if any such appeal is abandoned or withdrawn, be final and shall not be called in question in any civil court.***

The learned High Court Judge concluded that section 22 of the Interpretation Ordinance read with section 58(5) of the Law limited the grounds on which the arbitral award can be challenged. Presumably the learned High Court Judge had section 58(6) of the Law in mind as section 58(5) of the Law applies to a decision of the Registrar.

However, our courts have in a long line of decisions held that pre-constitutional ouster clauses in legislation read with section 22 of the Interpretation Ordinance do not have the capacity to oust or limit the writ jurisdiction vested in the Court of Appeal by virtue of Article 140 of the Constitution. [*Atapattu v People's Bank* (1997) 1 Sri LR 208, 221 – 222; *Sirisena Cooray v Tissa Dias Bandaranayake* (1999) 1 Sri LR 1, 13- 14; *Wijeypala Mendis v Perera* (1999) 2 Sri LR 110, 119; *Moosajees Ltd v Arthur* (2004) 2 ALR 1, 15)].

The reasoning adopted in the above decisions is that ouster clauses were inoperative in the face of the Court of Appeal's constitutionally enshrined writ jurisdiction. This reasoning is equally applicable to the writ jurisdiction of the Provincial High Court which is also constitutionally enshrined by virtue of Article 154P (4). Therefore, I am of the opinion that the constitutionally enshrined writ jurisdiction of the Provincial High Court cannot be ousted or limited by section 58(6) of the Cooperative Societies Law read with Section 22 of the Interpretation Ordinance. I

arrived at a similar conclusion in *Kiri Banda v. Irangani Samaraweera, Commissioner of Co-operative Development (Western Province) and others* [CA(PHC) 98/2007, C.A.M. 19.10.2018].

Therefore, I am of the view that the conclusion of the learned High Court Judge on this issue is erroneous.

However, for the reasons set out earlier, I see no reason to interfere with the judgment of the of the learned High Court Judge of the Western Province holden in Gampaha dated 22.01.2014.

The appeal is dismissed with costs fixed at Rs. 50,000/=.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal